No. 03-1500

IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his Official Capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL IN SUPPORT OF RESPONDENT

BENJAMIN W. BULL
Counsel of Record
JORDAN W. LORENCE
GARY S. MCCALEB
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Suite 165
Scottsdale, AZ 85260
(480) 444-0020

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE *LEMON* AND ENDORSEMENT TESTS SHOULD BE ABANDONED BECAUSE THEY ARE BASED ON AN ERRONEOUS VIEW OF HISTORY 4

A. The *Everson* Court Neglected The Most Relevant Evidence Of The Establishment Clause's Meaning 5

B. The *Everson* Court Violated The Principle Of Federalism By Relying On Virginia's History In Interpreting The Establishment Clause 9

C. Even If Virginia's History Is Relevant, It Does Not Support A Strict Separationist Interpretation of the Establishment Clause 11

D. The *Everson* Court Adopted A Version Of Church-State Separation That Conflicts With Conspicuously Pro-Religious Actions Taken By Early Congresses 14

II. THIS COURT SHOULD REPLACE THE *LEMON* TEST WITH A COERCION TEST 16

A. The Most Historically Defensible Establishment Clause Test Is The Coercion

Test 17

B. The Coercion Test 21

1. The Coercion Test As Applied To Government Actions Acknowledging Religion 21

2. The Coercion Test As Applied To Access By Religious Groups To Government Funding And Services 23

3. The Coercion Test Reaffirms The Federal Judiciary's Constitutional Role Of Deciding "Cases" and "Controversies" 24

III. THE TEN COMMANDMENTS MONUMENT CHALLENGED BELOW SURVIVES SCRUTINY UNDER THE COERCION TEST 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

ACLU v. Capitol Square Review and Advisory Bd., 243 F.3d 289 (6th Cir. 2001) 16

Adland v. Russ, 307 F.3d 471 (6th Cir. 2002) 24

American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987) 26

Barron v. Baltimore, 32 U.S. 243 (1833) 8

Board of Education v. Allen, 392 U.S. 236 (1968) 4

Cantwell v. Connecticut, 310 U.S. 296 (1940) 20, 21

Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) 9, 21, 23, 26

Everson v. Board of Education, 330 U.S. 1 (1947) 2, 3, 5, 6, 11

Lee v. Weisman, 505 U.S. 577 (1992) 17, 19, 21, 23, 27

Lemon v. Kurtzman, 403 U.S. 602 (1971) 3

Lynch v. Donnelly, 465 U.S. 668 (1984) 3, 9

Marsh v. Chambers, 463 U.S. 783 (1983) 3, 14, 22

Newdow v. Bush, No.1:04CV02208 (D.D.C. filed Dec. 21, 2004) 25

Printz v. United States, 521 U.S. 898 (1997) 8

Robinson v. City of Edmond, 68 F.3d 1226 (10th Cir. 1995) 24

Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).....3, 4, 27

Smith v. County of Albemarle, 895 F.2d 953 (4th Cir. 1990) 24

Staley v. Harris County, 332 F. Supp. 2d 1030 (S.D. Tex. 2004).....25

Suhre v. Haywood County, 131 F.3d 1083 (4th Cir. 1997) 25

Texas v. Johnson, 491 U.S. 397 (1989).....26

United States Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).....8

United States v. Richardson, 418 U.S. 166 (1974) 26

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982).....24, 25

Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003).....22, 28

Wallace v. Jaffree, 472 U.S. 38 (1985).....4, 5, 14, 24

West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).....22

Widmar v. Vincent, 454 U.S. 263 (1981).....23

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).....22

Wooley v. Maynard, 430 U.S. 705 (1977).....22

Zelman v. Simmons-Harris, 536 U.S. 639 (2002).....23

STATUTES

1 Stat. 50 (1789).....14

10 Stat. 1031 (1853).....15

14 Stat. 679 (1865).....15

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III 21

OTHER AUTHORITIES

2 Charles Kappler, *Indian Affair — Law and Treaties* (1904).....14

26 *Journals of the Continental Congress* (Worthington C. Ford et al. eds., 1904-37).....15

Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (1990).....9

Chester James Antieau, et al., *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).....7, 8, 14, 15, 18, 19

Creating the Bill of Rights: The Documentary Record from the First Federal Congress (Helen E. Veit et. al. eds., 1991).....7, 10, 17

Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 Emory L.J. 223 (2000).....4, 5

Edward S. Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Probs. 3 (1949) 17, 18

George Washington, 4 *Annals of Cong.* (1796) 15, 16

Gerard V. Bradley, *Church-State Relationships in America* (1987) 6, 8, 9, 10, 12, 13

I The Debates in the Several State Conventions on the Adoption of the Federal Constitution — Together with the Journal of the Federal Constitution — Together with the Journal of the Federal Convention (Jonathan Elliot, ed., Washington 1938) 18, 19

James Madison, IX *Writings of James Madison* (Gaillard Hunt, ed., 1900-1910) 9

James Madison, *Writings* (Jack N. Rakove ed., 1999) 8, 14, 20

John Witherspoon, *Lectures on Moral Philosophy* (Varnum Collins ed., 1912) 16

Joseph Story, *Commentaries on the Constitution of the United States* (reprint 1987) (1833) 10

Leonard Levy, *The Establishment Clause* (1986) 19

Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (1965) 5

Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986) 18, 20, 21

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 16, 19

Paul G. Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 Ariz. L. Rev. 307 (1973) 6, 11

Report of the Committee of Revisors Appointed by the General Assembly of Virginia in 1776 (Richmond: Printed by Dixon and Holt, 1784) 12

Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 Utah L. Rev. 895 (1987) 5

Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982) 9, 10, 12

Stephen L. Carter, *The Culture of Disbelief* (1993) 16

The Annapolis Complex Collection, A Wealth of Maryland History, *Roger Brooke Taney, at* http://www.mdarchives.state.md.us/msa/speccol/sc1500/sc1545/e_catalog_2002/rinehart1545.html 26

Thomas E. Buckley, S.J., *Church and State in Revolutionary Virginia, 1776-1787* (1977) 13

Thomas Jefferson, *Writings* (Merrill D. Peterson ed., 1984) 10, 20

INTEREST OF *AMICI*[1]

Focus on the Family is a California non-profit religious corporation committed to strengthening the family in the United States and abroad. Focus on the Family's interest in this case stems from its active involvement in the protection of free speech as well as the promotion of the freedom of religion. Focus on the Family actively opposes efforts to rid the "public square" of symbols and expressions of religious faith. Efforts by some to remove the Ten Commandments from public buildings, textbooks, and other facilities frequented by the public both deny the cultural and historical heritage of this country, and actively demean the religious beliefs of a substantial portion of the population. Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes Focus on the Family magazine and other literature that is received by more than 2 million households each month. Topics addressed in the daily radio broadcast and in printed literature published and distributed by Focus on the Family frequently concern religious expression, freedom of speech, and the right of individuals, privately, to express their opinions, whether religious or otherwise.

Family Research Council ("FRC") is a nonprofit research and educational corporation headquartered in Washington D.C. FRC exists to affirm and promote the traditional family

---

[1] This brief is filed with the consent of both parties. Petitioner filed a blanket consent for Amicus Curiae briefs with the Court. Respondent's letter of consent to this brief has been filed with the Court. Pursuant to Rule 37.6, no portion of this brief was authored by counsel for a party and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

and the Judeo-Christian principles upon which this country is built. FRC provides resources and guidance for citizens concerned about national policy as it relates to cultural morality.

Amici believe that the government may lawfully acknowledge the major role religious principles have served in forming our legal system and liberties. Specifically, the Ten Commandments monument displayed on the grounds of the Texas State government complex exemplifies lawful acknowledgment. *Amici* believe that banning such displays affirmatively denies the historical facts of our religious heritage as a nation.

SUMMARY OF THE ARGUMENT

This Court often and correctly relies on history in discerning the original meaning of the Establishment Clause. Unfortunately, in its first case interpreting that Clause, *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court relied on an inaccurate and incomplete view of the history surrounding the Establishment Clause's adoption.

Everson's historical analysis suffers from four essential flaws: (1) it neglected historical evidence critical to understanding the original intent behind the Establishment Clause; (2) it relied exclusively on Virginia's intrastate debate over state-established churches; (3) even worse, it myopically focused on one viewpoint within that debate that does not even support the Court's separationist interpretation of the Establishment Clause; and (4) it adopted a view of church-state relations that conflicts with the actions of early Congresses concerning religion. This Court's current Establishment Clause tests, the *Lemon* and endorsement tests, are based on *Everson*'s erroneous view of history, and should be abandoned.

This Court should adopt a coercion test in place of the *Lemon* and endorsement tests. The most relevant sources of

original intent regarding the Establishment Clause — the Congressional debates concerning the First Amendment and the state conventions considering ratification of the Constitution — support the adoption of this test. The coercion test outlaws coercion of religious orthodoxy or financial support by force of law or threat of penalty. The Ten Commandments display involved in this case easily passes the coercion test, and should be upheld.

ARGUMENT

This Court has often observed that the Establishment Clause must be interpreted in light of the historical understanding of that Clause. In *Everson v. Board of Education*, 330 U.S. 1 (1947), the first Supreme Court decision interpreting the Establishment Clause, the Court relied almost exclusively on history in adopting Thomas Jefferson's "wall of separation" metaphor as the central meaning of the Clause. *Id.* at 8-15. Subsequent decisions have confirmed that history is fundamental to understanding what the Establishment Clause is meant to protect. *See, e.g., Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213-214 (1963); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984). As Justice Brennan said in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): "[T]o give concrete meaning to the Establishment Clause 'the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers.'" *Id.* at 642-43 (citation omitted) (Brennan, J., concurring).

These opinions demonstrate that history must guide this Court's interpretation of the Establishment Clause. Indeed, the key to understanding why the *Lemon* and endorsement tests must be abandoned and, more importantly, what new test should replace them, is apprehending the intent of the founders in adopting the Clause. Unfortunately, the history

relied on by the *Everson* Court in interpreting the Establishment Clause has pushed Establishment Clause jurisprudence well outside of historical bounds.

I. THE *LEMON* AND ENDORSEMENT TESTS SHOULD BE ABANDONED BECAUSE THEY ARE BASED ON AN ERRONEOUS VIEW OF HISTORY

The *Lemon* and endorsement tests are unmistakably based on the Supreme Court's decision in *Everson*. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and *Board of Education v. Allen*, 392 U.S. 236 (1968), this Court explicitly tied the first two prongs of *Lemon* to the Court's decision in *Everson*. *Schempp*, 374 U.S. at 222; *Allen*, 392 U.S. at 243; *see also Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (observing that the *Lemon* test is grounded in *Everson*'s historical analysis and decision) (Rehnquist, J., dissenting). *Everson* also provides the basis for the endorsement test, which is merely a "refinement of the *Lemon* test," *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring), not a new test with an independent historical justification.

It is well-known that *Everson* contains numerous and serious historical errors. *See id.* at 108 (noting that *Everson*'s wall concept suffers from many "historical deficiencies") (Rehnquist, J., dissenting).[2] In *Everson*, the

[2] The *Everson* Court's historical analysis has been roundly criticized by legal scholars. Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 Emory L.J. 223, 232 (2000) ("There is broad agreement among critics that the Court was attracted to a selective, erroneous version of history in order to buttress the Justices' ideological predilection for an absolute separation between church and state."). Robert L. Cord, denouncing the precedential value of *Everson*, said that "by omitting any historical facts that ran counter to

(Footnote continued to next page.)

Court relied on founding era history, especially that of Virginia, in adopting the metaphor of a "wall of separation between church and State." *Everson*, 330 U.S. at 16. The *Everson* Court's conclusion is historically unsupportable for at least four reasons: (A) the Court failed to review the most reliable sources of the founder's intent with regard to the Establishment Clause; (B) the Court violated the principle of federalism by relying on Virginia's debate concerning state establishments of religion; (C) even if Virginia's history is relevant, it does not support a strict separationist interpretation of the Establishment Clause; and (D) the Court adopted a version of church-state separation that cannot be reconciled with the actions of early Congresses. Because the *Lemon* and endorsement tests suffer from the "same historical deficiencies as the wall concept itself," *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting), they should be abandoned.

A. The *Everson* Court Neglected The Most Relevant Evidence Of The Establishment Clause's Meaning

There are three primary sources for determining the original meaning of the Establishment Clause: the Congressional debates concerning the Clause; the state

the impregnable wall [of separation] thesis, all the opinions in *Everson* display a fallacious history by omission that should no longer be allowed to pass for an adequate, scholarly, or even fair scrutiny in search of the establishment clause's prohibitions." Dreisbach, *supra* at 233 (quoting Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 Utah L. Rev. 895, 901 (1987)). Mark DeWolfe Howe argued that in *Everson* the Court "recounted American history 'not in order to tell accurately the story of the past, but in order to legitimate its own policy judgment.'" Dreisbach, *supra* at 232 (quoting Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 168 (1965)).

conventions considering ratification of the federal Constitution; and the practices of the several states concerning church establishment at the time of the founding. Of these three sources, the practices of the states are the least relevant because, at the founding, the establishment issue was distinctly different on the federal and state levels. As church-state historian Gerard Bradley observed,

> Equating . . . an intrastate contest . . . with federally imposed norms is fundamentally ill conceived. Most especially in the founding era, there should be no presumption that what the people thought an appropriate method of governing federal affairs corresponded to their notion of good state government—and vice versa.

Gerard V. Bradley, *Church-State Relationships in America* 12 (1987). The purpose of the Establishment Clause, *see infra*, § I.B., was to protect each state's unique policy concerning the establishment of religion from interference by the new federal government. A glaring problem with *Everson*, then, is that it relied almost exclusively on the struggle for religious liberty in Virginia to give context and meaning to the federal Establishment Clause, *Everson*, 330 U.S. at 11-13 (majority); *id.* at 33-41 (Rutledge, J., dissenting), and neglected the Congressional debates and state ratifying conventions.[3]

---

[3] Bradley, *supra* at 12 (noting the importance of the Congressional debates and state ratifying conventions in interpreting the Establishment Clause); Paul G. Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 Ariz. L. Rev. 307, 318 (1973) ("It must be remembered that this was a constitutional amendment and that equal regard must be given not only to the views of others who participated in its drafting, but also to the understanding of the Congress which submitted the amendment to the states and to the understanding of the states which ratified it.").

The Congressional debates regarding the First Amendment contain important evidence of the founders' intent regarding the First Amendment. "[T]he task of the First Congress . . . was to assimilate the proposals submitted by the states together with what was thought to be politically satisfactory and in the best interests of both religion and the government." Chester James Antieau, et al., *Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 207 (1964).[4] The views expressed by Representatives during the Congressional debates are vital to a proper interpretation of the Establishment Clause because they were affected by the proposals made by the state ratifying conventions for a federal constitutional provision protecting religious liberty.[5]

---

[4] This illuminates another reason, in addition to those discussed in § I.B, *infra*, why the *Everson* Court's reliance on Virginia's religious liberty history, and the roles played by Madison and Jefferson in making that history, is misplaced. Of the two great protagonists for religious freedom in Virginia, only Madison was a member of the First Congress. Madison penned a first draft of the Establishment Clause, introduced that draft to the Congress, and debated the Clause on the floor. *See Creating the Bill of Rights: The Documentary Record from the First Federal Congress* xiv-xv (Helen E. Veit et. al. eds., 1991) [hereinafter Creating the Bill of Rights]. Madison's leading role in proposing the Establishment Clause and steering it through Congress entitles his comments in the context of the Congressional debates to significant weight in determining its meaning. *Id.* at xvi ("Madison has a greater claim to being known as the father of the Bill of Rights than of the Constitution. Without his commitment there would have been no federal Bill of Rights in 1791."). Jefferson, on the other hand, was not a member of the First Congress. Therefore, his views are far less relevant than Madison's in interpreting the constitutional meaning of the Establishment Clause.

[5] Antieau, et al., *supra* at 111 ("[T]he members of the First Congress under the Constitution of the United States certainly attempted to honor the wishes and demands of the states for additional safeguards of religious freedom through amendments. . . . [A]ny study of the First Amendment must include the state proposals.") (emphasis added).

Similarly, a review of the state ratifying conventions' intentions regarding the Establishment Clause is imperative to understanding its meaning.[6] Under our governmental system, the federal government is entirely a creature of the states. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839 (1995) ("A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it.") (Kennedy, J., concurring). The powers contained in the Constitution represent those surrendered by the states to the federal government. *Printz v. United States*, 521 U.S. 898, 919 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'") (citation omitted). After ratifying the Constitution, the states imposed limitations on the powers they gave to the federal government by ratifying the Bill of Rights which, of course, included the Establishment Clause. *Barron v. Baltimore*, 32 U.S. 243, 247-48 (1833). Because the Constitution is a product of the states, it should be construed consistent with what the states intended in ratifying the Constitution and the Bill of Rights. The states' intent is best discovered by reviewing the state ratifying conventions. James Madison himself advocated relying on the state ratifying conventions to determine the meaning of the Constitution.[7]

---

[6] Bradley, *supra* at 12 (discussing the significance of the state ratification process in determining the meaning of the Establishment Clause).

[7] James Madison, *Letter to Henry Lee*, June 25, 1824, *in* Writings 803 (Jack N. Rakove ed., 1999) ("I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that not be the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers.") (emphasis added); *see also* Antieau, et al., *supra* at ix ("Madison stressed

(Footnote continued to next page.)

Because the *Everson* Court omitted both the Congressional debates and the state ratifying conventions from its historical analysis, it supplanted the historically intended "fence between good neighbors," *Lynch*, 465 U.S. at 673 ("[T]he Constitution [does not] require complete separation between church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."), with a Berlin wall.

B. The *Everson* Court Violated The Principle Of Federalism By Relying On Virginia's History In Interpreting The Establishment Clause

The principle of federalism played a pivotal role in the adoption of the Establishment Clause. At the time of ratification, each state had a unique approach to dealing with religious matters and they did not desire a uniform national standard concerning religious liberty.[8] As Madison put it

---

that the meaning of the Constitution is to be found 'in the sense attached to it by the people in their respective State Conventions where it received all the authority which it possessed.'") (quoting James Madison, *Letter to Thomas Ritchie*, Sept. 15, 1821, *in* IX *Writings of James Madison* 71-72 (Gaillard Hunt, ed., 1900-1910)).

[8] Many scholars have concluded that the actual purpose of the Establishment Clause was to prevent the Congress from interfering with the diverse state approaches to religious freedom. Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 5, 15 (1982); Bradley, *supra* at 12; Arlin M. Adams & Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* 46 (1990) (noting that a main purpose of the religion clauses was "to prevent congressional interference with existing state establishments"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2330 (2004) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.") (Thomas, J., concurring).

during the Congressional debates, if the word "national was inserted before religion . . . it would point the amendment directly to the object it was intended to prevent."[9] Indeed, without a guarantee of federal non-interference, states with religious establishments like New Hampshire, Vermont, and Maryland likely would not have ratified the First Amendment.[10] The states were not interested in adopting any one state's approach to religious liberty on the national level, but were interested in ensuring that they could pursue their policies regarding religion free from the interference of the national government.[11]

The *Everson* Court contravened the federalism principle

---

[9] Creating the Bill of Rights, *supra* at 158. Thomas Jefferson echoed Madison's federalism argument regarding the Establishment Clause in a letter written in 1808:

> I consider the government of the U.S. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U.S. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the State, as far as it can be in any human authority.

Thomas Jefferson, *Letter to Rev. Samuel Miller*, Jan 23, 1808, *in* Writings 1186-87 (Merrill D. Peterson ed., 1984).

[10] Bradley, *supra* at 12.

[11] Cord, *supra* at 5 (noting that the Establishment Clause was designed "to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit"); *see also*, Joseph Story, *Commentaries on the Constitution of the United States* §992 (reprint 1987) (1833) (noting that the Establishment Clause left "the whole power over the subject of religion . . . exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions").

by giving James Madison's *Memorial and Remonstrance* and Thomas Jefferson's *Bill for Religious Liberty* — both products of the Virginia debate over religious freedom — virtually dispositive weight in construing the federal Establishment Clause. *Everson*, 330 U.S. at 14 (observing that the "provisions of the first amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia [Religious Liberty] statute."); *id.* at 39 ("All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our [federal] constitutional tradition.") (Rutledge, J., dissenting). This misplaced reliance on Virginia history led to *Everson*'s historically incorrect assumption that the Establishment Clause's impact upon religious liberty is virtually identical to Virginia's choices regarding religious liberty.[12] In ratifying the Establishment Clause, the states intended to prevent the federal government from supplanting their approaches to religious affairs, not to adopt the "Virginia approach" on such matters.

C. Even If Virginia's History Is Relevant, It Does Not Support A Strict Separationist Interpretation of the Establishment Clause

Significantly, the views of Madison and Jefferson within the Virginia religious liberty debate do not even support a strict separation between church and state under the Establishment Clause. In the same year that Madison published his *Memorial and Remonstrance* (1785), he also introduced three bills in the Virginia Assembly dealing with

---

[12] Kauper, *supra* at 318 ("There is no substantial evidence to indicate that the no-establishment phrasing [of the First Amendment] was generally understood to convey a meaning that could be equated with the Virginia Bill of Religious Liberty . . . .").

religious liberty: Jefferson's "Bill for Religious Liberty," "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," and "A Bill for Appointing Days of Public Fasting and Thanksgiving."[13] The Sabbath law, likely written by Jefferson,[14] prohibited work on Sunday and imposed a fine of ten schillings for each offense.[15] The fasting and thanksgiving law, also likely written by Jefferson, provided the following: "Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse."[16] Madison's sponsorship and Jefferson's likely authorship of these bills calls into serious question the *Everson* Court's fundamental holding that Madison and Jefferson were the fathers of the constitutional principle of strict separation between church and state.

Moreover, the *Everson* Court failed to recognize that Madison's and Jefferson's views were but one view among many in Virginia concerning church-state relations. Madison's *Remonstrance*, a petition against the Assessment Bill,[17] scarcely stood alone, and only one fifth of all the

---

[13] Cord, *supra* at 220-21.

[14] Jefferson had been appointed to a committee to revise Virginia's laws in 1776. *Id.* at 216. While not definitively determined, "the most accepted theory seems to be that Jefferson was responsible for revising" the Sabbath Law. *Id.* at 216-17.

[15] *Id.* at 217.

[16] *Id.* (quoting Report of the Committee of Revisors Appointed by the General Assembly of Virginia in 1776 (Richmond: Printed by Dixon and Holt, 1784)).

[17] The Assessment Bill was the target of Madison's *Remonstrance*. In effect, the Bill would have placed "a clergyman on the government

(Footnote continued to next page.)

Virginians who signed their names to such petitions signed it.[18] Other influential petitions against the Bill were circulated. According to one historian, these other petitions hold "the key to understanding the nature of the religious settlement in Virginia."[19] While opposed to the assessment, they insisted that "liberty of conscience demanded that the state treat all religious groups equally."[20] Moreover, these same petitions expressed the need for government to "institutionalize certain Christian norms and values."[21] Baptist petitions, for instance, urged the Virginia legislature to "do 'its part in favour of Christianity' by 'supporting those Laws of Morality, which are necessary for Private and Public happiness.'"[22] Thus, the *Everson* Court's strict separationist interpretation of the Virginia debate over religious freedom is a selective and seriously skewed reading of Virginia history.

---

payroll in his sacerdotal and ecclesiastical capacities" and would have funded "the system by direct coercion of individuals." Bradley, *supra* at 13.

[18] Thomas E. Buckley, S.J., *Church and State in Revolutionary Virginia, 1776-1787*, at 175 (1977).

[19] *Id.*

[20] *Id.* at 177.

[21] *Id.* at 182.

[22] *Id.* at 181 (quoting Religious Petitions, Cumberland County, Oct. 24, 1776, Nov. 12, 1784, Nov. 3, 1785 (unpublished Religious Petitions, 1774-1802, presented to the General Assembly of Virginia) (on file with the Virginia State Library, Richmond)).

D. The *Everson* Court Adopted A Version Of Church-State Separation That Conflicts With Conspicuously Pro-Religious Actions Taken By Early Congresses

The outgrowth of *Everson*'s strict separation doctrine, the *Lemon* and endorsement tests, require governments to have a secular purpose for actions concerning religion. If this is true, then the federal government has consistently violated the Establishment Clause.[23] The United States has passed laws with patent religious purposes,[24] taken actions to achieve obvious religious ends,[25] and entered into several international treaties that invoke the favor of divine

---

[23] The "secular purpose" requirement also clashes with the fundamental reason that proponents of religious freedom, including Madison, sought disestablishment: to promote and expand the influence of religion in America. As Madison put it, "the policy of the Bill is adverse to the diffusion of the light of Christianity. . . . Instead of Levelling . . . every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error." James Madison, *Memorial and Remonstrance*, *in* Writings, *supra* at 34-35.

[24] The First Congress, for instance, reenacted the Northwest Ordinance of 1787, which provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Wallace*, 472 U.S. at 100 (quoting 1 Stat. 50, 52 n. (a) (1789)).

[25] The First Congress sanctioned legislative prayer at the same time they approved the draft of the First Amendment, which included the Establishment Clause, for submission to the states. *Marsh*, 463 U.S. at 790. As President, Thomas Jefferson negotiated and received Senate approval for a treaty with the Kaskaskia Indians which provided federal money "for the support of a priest of" the Catholic religion and for "the erection of a church." Antieau, et al., *supra* at 167 (quoting 2 Charles Kappler, *Indian Affair — Law and Treaties* 67 (1904)).

providence.[26] After analyzing the actions of the early Congresses regarding religion, one scholarly study concluded: "The practices of the times following ratification of the First Amendment attest that this generation accepted as normal the use of governmental funds to encourage religion and religious education. . . . [T]he Congress . . . was agreeable to using public funds to see that persons had ample opportunities for exposure to religion."[27]

The "secular purpose" prong is also out-of-step with this nation's religious heritage. The founding generation unequivocally acknowledged the religious underpinnings of this nation, and the need for robust faith among the citizenry. George Washington chose the occasion of his farewell to public life to address the importance of religion to American society:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

George Washington, *Farewell Address*, *in* 4 *Annals of Cong.*

---

[26] *See, e.g.*, *The Definitive Treaty of Peace of 1783*, *in* 26 *Journals of the Continental Congress* 23 (Worthington C. Ford et al. eds., 1904-37) (beginning "In the name of the most holy and undivided trinity.") (the treaty was signed by John Jay, John Adams, and Benjamin Franklin); *United States Treaty with Morocco Upholding the Light-House at Cape Spartel, May 31, 1865*, 14 Stat. 679 ("In the name of the only God! There is no strength nor power but of God."); and *The Gadsen Purchase Treaty, December 30, 1853*, 10 Stat. 1031 ("IN THE NAME OF ALMIGHTY GOD").

[27] Antieau, et al., *supra* at 167.

2876 (1796). John Witherspoon, who taught James Madison at Princeton, advised that "to promote religion is the best and most effectual way of making a virtuous and regular people." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2196-97 (2003) (citing John Witherspoon, *Lectures on Moral Philosophy* 110 (Varnum Collins ed., 1912). More recently, Franklin D. Roosevelt observed that the American people "hold to the inspiration of the Old Testament and accept the Ten Commandments as the fundamental law of God." *Quoted in* Stephen L. Carter, *The Culture of Disbelief* 100 (1993). Dwight D. Eisenhower recognized "[w]ithout God there could be no American form of government, nor an American way of life." *Id.* Indeed, absent our Declaration of Independence and its reliance upon a Creator with greater authority than our government, we would have no Constitution to construe.

"If our history demonstrates anything, it demonstrates that the people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." *ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001) (internal quotes omitted). Yet this is precisely the result produced by the *Lemon* and endorsement tests. Because they are based on a flawed view of the original understanding of the Establishment Clause, and because they produce absurd results that are inconsistent with this nation's religious history and heritage, the *Lemon* and endorsement tests should be abandoned.

II. THIS COURT SHOULD REPLACE THE *LEMON* TEST WITH A COERCION TEST

Setting aside *Lemon* and its sour progeny will neither open the door to theocracy nor encouragement to an American Taliban. Rather, the most relevant and reliable historical sources point to the correct safeguard against the

establishment of religion. These sources are the Congressional debates regarding the Establishment Clause and the state conventions considering ratification of the federal Constitution. *See supra*, § I.A. Each unmistakably points this Court toward the proper test for the Establishment Clause: coercion. *See Lee v. Weisman*, 505 U.S. 577, 641-44 (1992) (advocating adoption of a coercion test) (Scalia, J., dissenting).

A. The Most Historically Defensible Establishment Clause Test Is The Coercion Test

Because James Madison drafted, proposed, and guided the First Amendment through the First Congress, his statements concerning the Establishment Clause's meaning during the Congressional debates are entitled to significant weight. During those debates, Madison discussed the Establishment Clause's purpose, saying that "he apprehended the meaning of the words to be, that congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[28] Madison reiterated his understanding later in the debates. He said that he "believed that the people feared one sect might obtain pre-eminence, or two combine together and establish a religion to which they would compel others to conform."[29] As Edward S. Corwin concluded after reviewing the Congressional debates, according to Madison's words "'to establish' a religion was to give it a preferred status, a pre-eminence, carrying with it even the right to compel others to conform.'" Edward S. Corwin, *The Supreme Court as*

---

[28] Creating the Bill of Rights, *supra* at 157 (emphasis added).

[29] *Id.* at 158 (emphasis added).

National School Board, 14 Law & Contemp. Probs. 3, 11 (1949) (emphasis added); *see also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933, 937 (1986) (concluding from Madison's words that "compulsion is not just an element, it is the essence of establishment"); Antieau, et al., *supra* at 127 ("Madison himself may have desired and believed the people wanted an amendment which would simply prevent the national government from establishing '*a* national religion' which would 'compel men to worship God in any manner contrary to their consciences.'") (emphasis in original).

The declarations and amendments proposed by several state ratifying conventions support this interpretation of the Establishment Clause. Both the Rhode Island and North Carolina conventions adopted a "declaration of principles" that contained language identifying compulsion as a fundamental component of an establishment:

> That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence; and therefore all men have a natural, equal, and unalienable right to the exercise of religion according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established, by law, in preference to others.

Antieau, et al., *supra* at 112 (quoting I The Debates in the Several State Conventions on the Adoption of the Federal Constitution — Together with the Journal of the Federal Constitution — Together with the Journal of the Federal Convention 334 (Jonathan Elliot, ed., Washington 1938) (emphasis added)). The Virginia ratifying convention proposed an amendment that contained virtually identical

language. See *id.* at 119.

Upon a comprehensive review of the available sources concerning the original intent of the Establishment Clause,[30] The Institute for Church-State Law at Georgetown University concluded:

> [The constitutional generation] sought to omit from the ambit of Federal Government any power to bring about the discriminatory consequences and specific abuses which could flow from an improper relationship of the churches and the government. The First Amendment was intended to prevent the birth of federal political persecution and financial prejudice on the basis of religion.

Antieau, et al., *supra* at 207 (emphasis added). The "specific abuses" and "political persecution" historically associated with establishments of religion were discussed by Justice Scalia in *Lee v. Weisman*, 505 U.S. 577 (1992): "Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities." *Id.* at 641 (citing Leonard Levy, *The Establishment Clause* 4 (1986)); *see also* McConnell, 44 Wm. & Mary L. Rev. at 2207-08 (noting that "the most salient aspect of the historical establishment" was "government control over religion").

As noted above, relying on a state's internal debate over state-established churches to determine the meaning of the

---

[30] The sources considered in this review included, among many others: proposals for a religious freedom amendment made by the state conventions that ratified the Constitution; the statements of Senators and Representatives in the First Congress; and the practices of and laws passed by the early Congresses. *See* Antieau, et al., *supra* at 111-42, 159-88.

federal Establishment Clause is ill-advised. *See supra* § I.B. Yet it is worth noting that even Virginia's own history, which this Court repeatedly relies on in interpreting the Establishment Clause, supports the adoption of a coercion test. *See* McConnell, 27 Wm. & Mary L. Rev. at 937-39. Madison's *Memorial and Remonstrance* identified coercion as the essential flaw of the Virginia Assessment Bill. Madison began his *Remonstrance* by citing the general principle that religion "can only be directed by reason and conviction, not by force or violence." James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* Writings, *supra* at 30 (emphasis added). This principle, Madison argued, is violated by government actions that "force a citizen to contribute" or to "conform" to an established church. *Id.* at 31 (emphasis added).[31] Similarly, Jefferson's Bill for Religious Liberty supports a coercion test. Jefferson's Bill attacks laws that attempt to influence religious belief through "punishments," "bur[d]ens," or "civil incapacitations," or that "force" or "compel" a citizen to contribute money to a religious establishment. Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* Writings 346 (Merrill D. Peterson ed., 1984).[32] The historical evidence leaves no doubt: legal coercion is an essential aspect of a religious establishment.[33]

---

[31] Madison also decried "compulsive support" for an established sect and "attempts to enforce [establishments] by legal sanction." James Madison, *Memorial and Remonstrance*, *in* Writings, *supra* at 31, 35 (emphasis added).

[32] Jefferson's Bill further stated: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ." Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* Writings, *supra* at 347 (emphasis added).

[33] That coercion is an element of an establishment of religion is not a novel idea to this Court. In *Cantwell v. Connecticut*, 310 U.S. 296

(Footnote continued to next page.)

B. The Coercion Test

In accordance with the history outlined above, this Court should adopt the coercion test discussed by Justice Scalia in *Lee v. Weisman*, 505 U.S. at 641-44 (Scalia, J., dissenting); *see also Newdow*, 124 S. Ct. at 2331-33 (discussing the coercion test and applying it to the Pledge of Allegiance) (Thomas, J., concurring). Justice Scalia, speaking for Chief Justice Rehnquist and Justices Thomas and White, stated the test succinctly: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee*, 505 U.S. at 640 (emphasis in original). *See also* McConnell, 27 Wm. & Mary L. Rev. at 933. This test should replace the *Lemon* and endorsement tests in cases involving government acknowledgement of religion and will complement the neutrality principle used in cases involving access by religious groups to government funding and services. It also will reaffirm the judiciary's role of deciding "cases" and "controversies." U.S. Const. art. III, § 2. To illustrate the contours of the coercion test, we apply it below to common Establishment Clause questions and the instant case.

1. The Coercion Test As Applied To Government Actions Acknowledging Religion

Applying the coercion test to government actions acknowledging religion, like prayer at a public event or the display of the Ten Commandments, would clarify the line between forbidden establishment and permissible accommodation. The test should be applied with an eye to

---

(1940), the Supreme Court said that the Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." *Id.* at 303 (emphasis added).

acts thought constitutional by the First Congress. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (stressing that Acts "passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of [the Constitution's] true meaning."). This Court used that approach in *Marsh v. Chambers*, 463 U.S. 783 (1983), when it upheld the practice of paid chaplains praying before the Nebraska Legislature based on the First Congress' practice of employing chaplains.

Generally, the coercion test would permit governmental displays acknowledging the religious history and practices of this nation and its people. Such displays are typically passive. They do not compel the onlooker to accept the religious belief or heritage being honored. Moreover, the coercion test knows no favorites: Ten Commandments monuments, Christmas and Hanukkah symbols, and displays recognizing the heritage and traditions of other religious groups, like the symbol of Aztec prophecy located on the floor of the Texas State Capitol Rotunda, *see Van Orden v. Perry*, 351 F.3d 173, 176 (5th Cir. 2003), would comport with the coercion test.

Replacing the *Lemon* and endorsement tests with a coercion test will not license the government to run amuck in matters pertaining to religion. The First Amendment already provides strong protection for the rights of conscience without the *Lemon* and endorsement tests. *See West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that students with a conscientious objection to saying the Pledge of Allegiance must be excused from a state law requirement to recite it in public school); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that licensed car owners who object to the state motto may not be forced to display that motto on their license plates). The coercion test does not undermine, but complements, the First Amendment's commitment to

protecting conscience by forbidding government acts that coerce religious orthodoxy or financial support for religion by force of law or threat of penalty.

In addition, whether a government act satisfies the coercion test will depend on the specific facts of the situation under review. Hence, as with the *Lemon* and endorsement tests, what may be constitutionally permissible in one context under the coercion test, may not be permissible in a different context. *See Lee*, 505 U.S. at 643 (noting that within public schools the students' legal duty to attend and the parents' legal right to control their child's education affect the coercion analysis) (Scalia, J., dissenting).

2. The Coercion Test As Applied To Access By Religious Groups To Government Funding And Services

The coercion test would bring clarity to cases challenging a government act that provides funding or services to religious groups for the benefit a broader community. In this context, the coercion test would work in conjunction with the neutrality principle expressed in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). As Justice Thomas observed in *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004), legal coercion is an obvious element of any law that supports "religion generally through taxation." *Id.* at 2332. This is not the end of the analysis, however, in the context of laws that provide services or funding to religion. The neutrality principle applied by this Court in *Widmar* and *Zelman* teaches that such laws, which, like many government acts, are to some degree "coercive," pass constitutional muster so long as they provide aid in a manner that "is neutral in all respects toward religion." *Zelman*, 536 U.S. at 653.

This Court should adjust its neutrality test so that it comports more closely to this nation's founding history, as

well. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), then-Justice Rehnquist reviewed the evidence surrounding the adoption of the Establishment Clause and concluded that it was originally intended to forbid "preference among religious sects or denominations" but "did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." *Id.* at 106 (Rehnquist, J., dissenting). Under this adjusted neutrality test, government aid programs that favor one sect or religion over all others would violate the Establishment Clause; however, programs that provide services or funding to all religions equally would survive constitutional scrutiny.

3. The Coercion Test Reaffirms The Federal Judiciary's Constitutional Role Of Deciding "Cases" and "Controversies"

The expansive notion of "injury" arising from the *Lemon* and endorsement tests have turned the federal judiciary away from redressing concrete, particularized injuries. Now, federal judges act as prophylactic psychologists, sweeping "offensive" religious content from sight before an "eggshell atheist" plaintiff sees it. *See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (cross in city seal violates Establishment Clause); *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990) (nativity scene on lawn of county building violates the Establishment Clause); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (legislative resolution directing state official to include Ten Commandments monument in a historical and cultural display on the grounds of state capitol violated Establishment Clause). The Constitution requires an actual case or controversy, not mere hurt feelings. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487 (1982).

In *Valley Forge*, this Court rejected the notion that mere

psychological offense satisfied the standing requirement in Establishment Clause lawsuits. The Court unequivocally held that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is "not an injury sufficient to confer standing under Art. III." *Id.* at 485-86. Yet, despite *Valley Forge*, the *Lemon* and endorsement tests permit even the most *de minimis* "violation" of the Establishment Clause to come before a federal court.[34] The Fourth Circuit Court of Appeals' rule regarding standing in the Establishment Clause context exemplifies the problem: "The injury that gives standing to plaintiffs in [cases involving religious displays] is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state." *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997) (emphasis added). Adopting the coercion test would resolve the tension between *Valley Forge* and the *Lemon* and endorsement tests regarding standing. Under the coercion test, only plaintiffs that could demonstrate actual coercion would have standing to sue a government actor for violating the Establishment Clause.

This narrower approach to standing also comports with a

---

[34] Two cases currently in the federal courts are salient examples of this problem. In *Newdow v. Bush*, the plaintiff seeks a declaration that prayers at presidential inaugurations violate the Establishment Clause. The plaintiff asserts that such prayers make him "feel like a second class citizen and a 'political outsider.'" *Newdow v. Bush*, No.1:04CV02208, p. 5, (D.D.C. filed Dec. 21, 2004). In *Staley v. Harris County*, the plaintiff seeks removal of a private memorial containing a Bible which is located on the grounds of a county courthouse. The plaintiff asserts that the memorial "offended" her and "sends a message to her and to non-Christians that they are not full members of the Houston political community." *Staley v. Harris County*, 332 F. Supp. 2d 1030, 1034 (S.D. Tex. 2004). The District Court Judge granted the relief the plaintiff requested in *Staley*. *Id.* at 1041.

reality of life in a free republic: exposure to ideas with which one disagrees. As this Court has noted innumerable times, the First Amendment expects that citizens will confront ideas they find uncomfortable or offensive. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Newdow*, 124 S. Ct. at 2327 ("[T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.") (O'Connor, J., concurring).

The government speaks often, and undoubtedly sends messages that offend listeners frequently. For instance, one can assume that the statue of Chief Justice Roger Taney, who wrote the deplorable *Dred Scott* decision, located on the grounds of the Maryland State House[35] may seriously offend an African-American onlooker. This legitimately aggrieved individual, however, has no legal recourse to get the offensive statue removed, and neither should a person who passes a Ten Commandments monument displayed on public property. Lack of judicial remedy does not silence these individuals' opposition; both can assert their views through the political process and at the polls. *See United States v. Richardson*, 418 U.S. 166, 179 (1974); *see also American Jewish Congress v. City of Chicago*, 827 F.2d 120, 132-33 (7th Cir. 1987) ("When the government expresses views in

---

[35] The Annapolis Complex Collection, A Wealth of Maryland History, *Roger Brooke Taney*, at http://www.mdarchives.state.md.us/msa/speccol/sc1500/sc1545/e_catalog_2002/rinehart1545.html, last visited January 13, 2005.

public debates, all are as free as they were before; that these views may offend some and persuade others is a political rather than a constitutional problem.") (Easterbrook, J., dissenting).

III. THE TEN COMMANDMENTS MONUMENT CHALLENGED BELOW SURVIVES SCRUTINY UNDER THE COERCION TEST

Under the coercion test, plaintiffs must prove that they are compelled, by force of law or threat of penalty, to conform themselves to a religious orthodoxy prescribed by the State. The Ten Commandments display at issue in this case does not violate the coercion test. Unlike school prayer, which this Court views as coercive because students "are required by law to attend school," *Schempp*, 374 U.S. at 223, the Texas monument entails no compulsion. The display is entirely passive; no one is ordered to walk past it, pay homage to it, or participate in ceremonies around it. Neither does the display coerce or compel the passerby to conform to a certain belief system. Indeed, the display is "utterly devoid of legal compulsion." *Lee*, 505 U.S. at 643 (Scalia, J., dissenting). If graduation prayer does not violate the coercion test, as Justice Scalia found in *id.* at 642-44,[36] then the Texas monument at issue in this case certainly does not.

---

[36] Justice Kennedy's "psychological" coercion test should not be adopted by this Court because it is "boundless, and boundlessly manipulable." *Lee*, 505 U.S. at 632 (Scalia, J., dissenting). Even though Justice Kennedy rightly identified coercion as the key element of an Establishment Clause violation, the psychological aspect of his test renders it virtually indistinguishable from the *Lemon* and endorsement tests in application. The proposed "coercion" test is capable of more uniform application than the infinitely malleable "endorsement" or "psychological coercion" tests that treat "appearance" the same as substance.

The context of the Ten Commandments monument at issue in this case further demonstrates its lack of coercion. The monument is part of a display of seventeen monuments located on the grounds of the Texas State Capitol complex; the entire display is a registered historic landmark. *Van Orden*, 351 F.3d at 182. The variety of monuments placed at the Capitol shows that the State of Texas is not interested in forcing people to adopt or accept the Ten Commandments, but instead is interested in commemorating the people, ideas, and events central to Texas' identity. *Id.* at 180. Moreover, other statues, plaques, and seals located on the Texas State Capital grounds include religious messages and symbols. An inscription above the bench in the Supreme Court Building reads "Sicut Patribus, Sit Deus Nobis," which means "As God was to our fathers, may He also be to us." *Id.* at 176. A display on the floor of the Capitol Rotunda contains the Mexican Eagle and serpent, which "is a symbol of Aztec prophecy." *Id.* If the Establishment Clause requires the Ten Commandments monument on the Texas State Capitol grounds to be removed, then these other religious messages and symbols would have to be removed as well.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to adopt the coercion test to replace the *Lemon* and endorsement tests for deciding Establishment Clause cases.

Respectfully submitted,

BENJAMIN W. BULL
Counsel of Record
JORDAN W. LORENCE
GARY S. MCCALEB
JEREMY D. TEDESCO
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste.165
Scottsdale, Arizona 85260
(480) 444-0020

Attorneys for Amici Curiae